

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 93-213
Table of Allotments, FM Broadcast) RM-8351
Stations Balsam Lake, Wisconsin)
)
TO: Chief, Allocations Branch

OPPOSITION TO "PETITION FOR RECONSIDERATION"

Thomas F. Beschta ("Beschta"), by his attorney, hereby respectfully opposes the Petition for Reconsideration, filed in this proceeding by Lakeside Broadcasting, Inc. ("Lakeside"), under date of December 22, 1994. In opposition thereto, it is alleged:

1. On February 11, 1994, the Acting Chief, Allocations Branch, released a Report and Order (DA-94-100), allocating Channel 285C3 to Balsam Lake, Wisconsin, and establishing a window of March 29, 1994, for filing applications for that channel. In reliance upon the action of the Chief, Allocations Branch, Thomas F. Beschta, a resident of Rice Lake, Wisconsin, authorized his engineer and attorney to commence the preparation of an application for the channel. A site selection map was prepared and Mr. Beschta began the work of finding a suitable site. He also took other actions, looking towards the preparation of an application.

2. On February 25, 1994, however, the FCC issued a press

release (FCC 94-41) entitled "FCC Freezes Comparative Proceedings".

In that press release, the Commission stated as follows:

"Further, during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing opportunities or require the filing of amendments, integration proposals, or hearing fees. Applicants should, however, file amendments to update information relevant to their applications. Any such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze. No cases will be designated for hearings involving a standard comparative issue."

Thus, the Commission prima facie, made it very clear that any cut-off lists adopted prior to the imposition of the freeze would be suspended for the period of the freeze. In short, the Commission set aside the cut-off list for Balsam Lake which it had issued on February 11, 1994. Faced with that action, Mr. Beschta concluded that it would be a futile action to attempt to tender an application for Balsam Lake, because the cut-off list, opening the Balsam Lake window, had been set aside.

3. On August 4, 1994, the Commission released a Public Notice (FCC 94-204) modifying its freeze. Therein, the Commission announced that the window periods, which had been suspended by the February 25 order, "will be reopened for a full 30 day period by future Public Notice and by publication in the Federal Register". Subsequently, on November 23, 1994, the Commission released an Order (DA 94-1270), reopening the window for Balsam Lake for the time period from January 6, 1995 to February 6, 1995. Mr. Beschta plans to timely file an application for Balsam Lake during the newly reopened window.

4. Lakeside, however, has filed a Petition for Reconsideration, asking the Commission to set aside the window. Lakeside evidently went ahead in the face of the Commission's original freeze order and filed an application for Balsam Lake, notwithstanding the clear language of the freeze order to the effect that the window had been suspended. By its Petition for Reconsideration, Lakeside seeks to "freeze out" any additional competing applications.

5. There is no merit to the Lakeside petition. Lakeside does not claim that it had no actual notice of the freeze order. Therefore, whether the order was published in the Federal Register or not, Lakeside was in no way prejudiced. It had actual notice that the FCC was suspending the window and went ahead anyway at its peril.

6. As it turns out, however, there was no peril. The FCC has returned Lakeside's application and has agreed to return Lakeside's filing fee. Therefore, Lakeside has lost absolutely nothing. It can refile its application during the window and will suffer no financial loss. The only loss it will suffer is the right to be free of competing applications. However, Lakeside cites no law for the proposition that it has any such right. Of course, it does not.

7. The Court of Appeals has many times sustained the Commission's broad discretion to enforce its processing rules. See, e.g., Malkan FM Associates v. FCC, 935 F. 2d 1313, 290 U.S. App. D.C. 194 (D.C. Cir. 1991). There was nothing arbitrary or

capricious about the Commission's actions here, which would present any grounds for an appeal from those actions from Lakeshore or anybody else. By returning all of the applications filed during the suspended windows and returning the filing fees to the applicants who filed in those windows, the Commission acted in an even-handed manner, so that all applicants and potential applications affected by the suspended window will start even on a level playing field.

8. Beschta cannot imagine that the Commission's actions could ever be successfully challenged in any appellate forum. Moreover, the Commission did the right thing. Therefore, it should reaffirm its decision to reopen the Balsam Lake window for the time period from January 6, 1995 to February 6, 1995.

Respectfully submitted,

THOMAS F. BESCHTA

January 3, 1995

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CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 21st day of January, 1995, to the offices of the following:

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